IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH-SMC " B "

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER
AND SHRI VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A. No.486/Bang/2012 (Assessment Year : 2003-04)		
Asst. Commissioner of Income Tax, Circle 12(3), Bangalore.	Vs.	M/s. Sutures India Pvt. Ltd., No.118, 3rd Phase, 13th Cross, Peenya Indl. Area, Bangalore-560 058
Appellant		Respondent.

Appellant By : Shri N. Balakrishnan, Addl. CIT (D.R) Respondent By : Shri A. Shankar, Advocate.

Date of Hearing : 05.09.2017.
Date of Pronouncement : 25.10.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the revenue is directed against the order dt.10.01.2012 of Commissioner of Income Tax (Appeals) arising from the order passed by the Assessing Officer under Section 143(3) r.w.s. 263 of the Income Tax Act, 1961 (in short 'the Act') for the Assessment Year 2003-04.

2. The revenue has raised the following grounds :

1. The order of the Ld. CIT(A) is opposed to law and facts of the case.

2. The CIT(A) erred in granting relief u/s.80IA of Rs.40,93,489/- which had been denied following the directions in order u/s.263 without appreciating that the appeal of the assessee against the order of CIT u/s.263 is pending before ITAT.

3. The CIT(A) erred in holding that deduction u/s.80IA & 80HHC are independent to each other and therefore deduction u/s.80IA need not be deducted before computing deduction u/s.80HHC, relying on the judgement of Hon'ble High Court of Karnataka dt. 3.2.2011 in the case of CIT Vs. Millipore India without appreciating that the Department has filed SLP against this order in one of the cases where the tax effect was more than the prescribed limit and therefore the matter has not reached finality.

4. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

5. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.

3. Ground No.1 is general in nature and do not require any specific adjudication.

4. Ground Nos.2 to 4 are regarding denial of deduction under Section 80IA by the Assessing Officer while passing the order in pursuant to the revision order under Section 263 which was allowed by the CIT (Appeals).

5. The learned Departmental Representative has submitted that the claim of the assessee under Section 80IA was withdrawn by the CIT while passing the revision order dt.11.3.2008. The assessee challenged the said revision order passed under Section 263 before this Tribunal in appeal ITA No.1261/Bang/2008. The Tribunal vide order dt.13.11.2009 confirmed the revision order passed under Section 263. Thus the learned Departmental Representative has submitted that the Assessing Officer has passed a

consequential order in pursuant to the revision order under Section 263 and therefore, the disallowance made by the Assessing Officer is nothing but the decision taken by the Commissioner in the revision order under Section 263 which has been upheld by this Tribunal. Accordingly, the CIT (Appeals) had no jurisdiction to entertain and adjudicate the said issue on merits. Thus the learned Departmental Representative has submitted that the CIT (Appeals) has passed the impugned order without jurisdiction on the issue and therefore the same is not sustainable.

6. On the other hand, the learned Authorised Representative has submitted that the issue involved in the case regarding reducing the deduction under Section 80IA while computing the deduction under Section 80 HHC is no longer res integra as held by the Hon'ble jurisdictional High Court in the case of **CIT Vs. Millipore India Pvt. Ltd.** 341 ITR 219. Thus when the issue on merits is covered in favour of the assessee and the CIT (Appeals) has allowed the claim of the assessee by following the decision of Hon'ble jurisdictional High Court cited supra then the revenue cannot challenge the impugned order of the CIT (Appeals) on this issue. The learned Counsel for the assessee has further submitted that the assessee has already challenged the order of the Tribunal passed in the appeal against the revision order under Section 263 before the Hon'ble High Court. Therefore, when the issue on merit is already covered by the decision of Hon'ble High Court in the case of **CIT Vs. Millipore India Pvt. Ltd.** (supra), the order of the Tribunal against the revision order under Section 263 will not give any weight on the merits of the case. The learned Counsel for the assessee has further submitted that even the Hon'ble Supreme Court in the case of **ACIT Vs. Microlabs Limited** 380 ITR 1 has referred the issue to the

larger Bench due to the difference of opinion and therefore, the order of the Hon'ble jurisdictional High Court in the case of **CIT Vs. Millipore India Pvt. Ltd.** (supra) and ACIT Vs. Microlab Limited (supra) still holds the field on this issue. Thus he has submitted that there is no illegality or infirmity in the impugned order of the CIT (Appeals) when the issue is covered by the decision of the Hon'ble jurisdictional High Court which is binding precedent for the CIT (Appeals) as well as this Tribunal.

7. We have considered the rival submissions as well as the relevant material on record. Originally the assessment was completed under Section under section 143(3) on 14.6.2005. Thereafter the CIT on verification of the assessment record found that the order of the Assessing Officer was erroneous and prejudicial to the interest of revenue so far as the claim of deduction under Section 80 HHC as well as Section 80IA of the Act were allowed. Accordingly, the CIT proposed to revise the order of AO by issuing a show cause notice under Section 263 on 23.08.2007. The assessee filed its reply and written submission dt.7.3.2008 against the show cause notice under Section 263. The CIT after considering the reply of the assessee has come to the conclusion that the Assessing Officer has allowed the deduction under Section 80 HHC as claimed by the assessee without reducing the deduction allowed under Section 80 IA from the business profits for as required under Section 80 IA(9) of the Act. Accordingly, the assessment order dt.14.6.2005 was modified by the CIT to the extent that the deduction claimed under Section 80 IA is withdrawn and for the purpose of computing the deduction under Section 80HHC, the deduction

allowed under Section 80 IA has to be reduced from the business profits. The conclusion part of the revision order in paras 5 & 6 is as follows :

> *"5. The order under Section 143(3) dt.14.6.2005 is, therefore, modified to the extent that deduction claimed under Section 80IA is withdrawn and for the purpose of computing deduction under Section 80HHC, deduction allowable under Section 80IA has to be reduced from the business profits. Since deduction under Section 80IA is being denied, there will be no change in the computation of deduction under Section 80HHC for the time being. However, in case it is held by the appellate authority that the assessee is entitled to deduction under Section 80IA, the deduction under Section 80HHC will have to be recomputed keeping in mind the provisions of section 80IA(9).*
>
> *6. The Assessing Officer is directed to give effect to this order and withdraw deduction under Section 80IA and recompute (whenever necessary deduction under Section 80HHC in view of the provisions of Section 80IA(9)."*

Thus it is clear the CIT passed revision order passed under Section 263 and decided the issue of allowability of deduction under Section 80 IA as well as 80 HHC conclusively on merits. The Assessing Officer was directed to give effect the said order and withdraw the deduction under Section 80 IA and to recompute if required the deduction under Section 80 HHC in view of the provisions of Section 80 IA(9) of the Act. The question of re-computation of deduction under Section 80 HHC would arise only when the appellate authority or court would so direct for. Thus in the absence of any interference with the revision order, it was not open to the Assessing Officer to take any decision on the issue but just to pass a consequential order in pursuant to the revision order passed under Section 263 by the CIT. The assessee challenged the said

revision order passed under Section 263 before the Tribunal and this Tribunal vide order dt.13.11.2009 has held in paras 6 to 6.2 as under :

" 6. We have duly considered the rival submissions and also perused the relevant records.

6.1. Let us now deal with the contentions of the Ld. A.R.

(i) The Ld. A.R. had placed strong reliance on the finding of the Hon'ble Madras High Court referred supra. With due respects, we would like to point out, as rightly brought out by the Hon'ble Tribunal, Delhi Special Bench in its finding cited supra, that the applicability of section 80-IA(9) or similar provision under section 80-IB was not considered by the Hon'ble High Court in the case of SCM Creations;

(ii) In respect of the jurisdictional High court's ruling in the case of ITO v. Mandira Vakharia referred supra, with due regards, we are of the considered view, as highlighted by the Ld. CIT in the impugned order under dispute, that the case before the Hon'ble Court was that the assessee had failed to furnish a certificate of the Accountant along with the return and that the certificate was furnished subsequently along with an application for rectification. The High Court ruled that the assessee would be entitled to deduction u/ss.80HHE(4) and 80GG of the Act to the extent permitted by the Board's Circular No.669 whereas in the instant case there was no such Board's Circular to come to the assessee's rescue. Thus, the finding of the jurisdictional High Court doesn't help the assessee in any way;

(iii) Turning to the verdict of the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. cited supra, with highest regards, we would like to point out that the Hon'ble Highest Court of the country had ruled that –

"263. Revision of orders prejudicial to Revenue.---(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. Explanation---. . ."

A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin

conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous ; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent-if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1) of the Act.

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous ……

The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue ; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84(SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC).

With due respects, we would like to point out that here there were no two views possible in the case on hand - the Income-tax Officer had taken one view with which the Commissioner did not agree. As a matter of fact, the AO, without considering the legal position, had wrongly allowed deduction as claimed by the assessee, and, thus, the ruling of the Hon'ble Apex Court is on the different standing.

6.1.1. Let now we consider the Ld.D.R's plea. (i) On a similar issue, the Hon'ble Tribunal in the case of Ace Manufacturing Systems Limited v. CIT (LTU) in ITA No.333/B/2009 after analyzing the issue in detail, had observed that –

"4. we find that in case of M/s.Leben Laboratories Ltd. V. DCIT (2007) 294 ITR (AT) 1 wherein Mumbai Bench of ITAT held that sec.80HHC falls under the heading 'C'-deductions in respect of certain incomes in Chapter VI-A. Therefore, while computing the relief u/s 80HHC, effect had to be given to both the limbs provided in sec.80-IA(9). Therefore, the lower authorities were justified in reducing the profits of business of the undertaking by the amount of profits allowed as deduction u/s 80IA

while computing the deduction u/s 80HHC. We also find that Special Bench in the case of ACIT v. Rogini Garments (2007) 294 ITR (AT)15 (Chennai), wherein it was held that relevant to sec.80IA should be deducted from profit and gain of business before computing relief u/s 80HHC. Thus, the issue at hand has been settled……"

(ii) The Hon'ble ITAT, Delhi Bench 'C' (Special Bench) in the case of ACIT v. Hindustan Mint & Agro Products (P) Ltd. referred supra, was emphatic in its wisdom in concurring with the decision of the Chennai Special Bench in the case of ACIT v.Rogini Garments (2007) 108 ITD 49.

6.2. In an overall consideration of the facts and circumstances of the issue and also respectfully following the findings of the Hon'ble Tribunals referred supra, we are of the unanimous view that the CIT was fully justified in invoking the provisions of s.263 of the Act. It is ordered accordingly."

From the above findings it is clear that this Tribunal has upheld the revision order passed under Section 263 and consequently issue on merits was finalized till the stage of the Tribunal. In such a situation where the CIT in the revision order passed under Section 263 decided the issue on merits which has been upheld by this Tribunal then this issue was not open to the Assessing Officer to exercise his discretion or take a decision but to give effect to the order of the CIT passed under Section 263 in the terms as directed in the revision order. Therefore, though the consequential order passed by the Assessing Officer in pursuant to the revision order can be challenged before the CIT (Appeals) to keep the issue alive as per the final outcome of the appeal against the revision order however, the jurisdiction of the CIT (Appeals) is very limited and circumscribed only to the extent where the Assessing Officer could have or has taken a decision but in the case where the Assessing Officer has to pass a giving effect order of the revision order passed under Section 263 then the issue which was decided on merits by the CIT in the revision order is not open to the

CIT (Appeals) to entertain and adjudicate. There is separation of jurisdiction and powers of CIT under Section 263 and CIT (Appeals) under Section 250 of the IT Act. One of the authorities assumes and invokes the jurisdiction on an issue the jurisdiction of the other authority is specifically excluded. Therefore, neither the CIT while exercising the jurisdiction under Section 263 can entertain an issue which is pending in an appeal before the CIT (Appeals) nor the CIT (Appeals) can entertain an issue which was subject matter proceeding or order passed under Section 263 of the Act.

8. As regards the decision of the Hon'ble jurisdictional High Court in the case of **CIT Vs. Millipore India Pvt. Ltd.** (supra), the same is relevant in the appeal proceedings against the order passed under Section 263 and therefore even if the issue on merits may be covered by the said decision of the Hon'ble High Court the remedy is only to challenge the order dt.13.11.2009 of this Tribunal in the appeal against the revision order under Section 263 and to get the said order set aside from the Hon'ble jurisdictional High Court in the appeal filed by the assessee. So long the said order of the Tribunal dt.13.11.2009 is in existence and legally enforceable the decision of the Hon'ble jurisdictional High Court as relied upon by the assessee will not help the case of the assessee in the present proceedings. This view is fortified by the decision of Hon'ble Bombay High Court in the case of **Hardillia chemicals Ltd. Vs. CIT** 221 ITR 194 wherein the Hon'ble High Court has observed and held at pages 201 & 202 as under :

" **8.** On a reading of the revisional order of the Commissioner, we have no doubt in our mind that the direction of the Commissioner to the ITO to determine the relief under section 80J after giving an opportunity of being heard to the assessee was only for the purpose of recomputation of the amount of relief under section 80J by reducing the value of work-in- progress from the capital employed as held by him in

paragraphs 4 and 5 and by reducing the written down value of the assets by the extra shift allowance allowed in the past as held in para 6 of the revisional order. The direction to the ITO in the operative part of the order cannot be read in isolation. The order of the Commissioner read as a whole makes it abundantly clear that the Commissioner arrived at categorical and definite findings in regard to the contentions of the assessee about inclusion of work-in-progress in the capital employed for the purpose of claiming relief under section 80J and in regard to deductibility of extra shift allowance allowed in the past from the value of fixed assets for the very same purpose and remitted the matter to the ITO merely to perform the ministerial function of recalculating the amount of relief under section 80J.

9. In such a situation, it is extremely difficult on our part to accept the contention of the learned counsel for the assessee that in his revisional order, the Commissioner did not decide the points at issue and left if open to the ITO to examine the same after hearing the assessee. In fact, as stated above, what was left to the ITO was only the ministerial work of recomputing the relief under section 80J, obviously, subject to the findings contained in the order.

10. In our view, reference to and reliance on the operative part of the order without regard to the text of the order and the findings recorded therein is wholly misplaced and improper. To understand the true purport of an order, it has to be read as a whole. The operative part of the order in this case has to be read and understood in the light of the controversy before the Commissioner and the questions decided by him. It cannot be read in isolation from the text of the order and the determination of the questions arising therein by the Commissioner. It is neither proper nor permissible to pick out any part of the order, and in case of remand order the operative part thereof and to read the same without regard to the questions decided therein to support the contention that all issues are left open for determination by the authorities below. The Tribunal, in this case, in our opinion, was right in holding that the revisional order, wherein a definite finding is recorded on both the points at issue, having become final on account of the failure of the assessee to pursue the statutory remedies provided in the Act against that order, the assessee cannot be allowed to challenge such concluded findings collaterally in an appeal filed against the fresh order passed by the ITO with a view to giving effect to the same.

11. In our opinion, though appeal is maintainable from the order passed by the ITO to give effect to a revisional order or an appellate order, only such issues can be agitated in such appeal which have not attained finality by virtue of earlier orders of the revisional or appellate authorities. It is not open in such an appeal to agitate any point which has already been decided by the revisional or the appellate authorities in their order.

12. In view of the above, we do not find any infirmity in the finding of the Tribunal in the instant case. Accordingly, question No. 1 is answered in the affirmative and in favour of the revenue. On the very same reasoning, question No. 2 is also answered in favour of the revenue. In the facts and circumstances of the case, there shall be no order as to costs.ò

Thus the Hon'ble High Court has laid down the principle that though an appeal is maintainable from a fresh order passed by the ITO to give effect to a revision order or an appellate order, only such issues can be agitated in such appeal which have not attained finality by virtue of earlier orders of the revisional or appellate authority. It is not open in such an appeal to agitate any point which had already been decided by the revisional or appellate authority in their order.

9. In the case on hand when the issue of deduction under Section 80 IA was decided by the CIT under Section 263 then neither the Assessing Officer nor the CIT (Appeals) has any jurisdiction to take any decision or even to entertain the said issue. Deciding this issue by the CIT (Appeals) in the impugned order amounts to reversal of the findings of the CIT. Therefore the CIT (Appeals) has travelled beyond the jurisdiction of entertaining and adjudicating the issue which was decided in the order passed under Section 263 and consequently upheld by the Tribunal. Hence we are of the considered view that the CIT (Appeals) while passing the impugned order has travelled beyond its jurisdiction and therefore, it is not sustainable. Accordingly, we set aside the impugned order of the CIT (Appeals) and restore the order of the Assessing Officer.

11. We take a serious view of the conduct of the CIT (Appeals) which is clearly a judicial indiscipline as the issue on merits was already confirmed by the Tribunal vide order dt.13.11.2009 and as such the CIT (Appeals) was not supposed to take a contradictory view on the same issue in assessee's own case

and that too in the proceedings arising in pursuant to the order under Section 263 of the Act. Thus it is clear case of violation of judicial discipline by the CIT (Appeals). A copy of this order may be sent to the CBDT for necessary action.

12. In the result, the appeal of revenue is allowed.

Order pronounced in the open court on this 25th day of Oct., 2017.

Sd/-	Sd/-
(A.K. GARODIA)	**(VIJAY PAL RAO)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore,
Dt.25.10.2017.

*Reddy gp

Copy to :

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Sr. Pvt. Secretary
Income Tax Appellate Tribunal
Bangalore.